71-1308

No.

In the

Supreme Court of the United States

OCTOBER TERM, 1971

WALTER PRITCHARD,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner respectfully prays that a Writ of Certiorari issue to review the order of the United States Court of Appeals for the Seventh Circuit entered on February 2, 1972, affirming the judgment of the United States District Court for the Northern District of Illinois, Eastern Division, finding the petitioner guilty of violating Sections 371 and 1952, Title 18, United States Code. Petitioner was sentenced to the custody of the Attorney General of the United States for a period of three years and fined the sum of $5,000.00.

JUDGMENT AND OPINION OF THE COURT BELOW

The judgment of the United States District Court for the Northern District of Illinois was entered on December 18, 1969, without opinion and is not reported. The opinion of the United States Court of Appeals for the Seventh Circuit affirming the judgment of the District Court was filed on February 2, 1972, No. 18341, and is not yet reported, but is set forth in the Appendix.

JURISDICTION

The order of the United States Court of Appeals for the Seventh Circuit was entered on February 2, 1972, and a timely petition for a rehearing was denied on March 10, 1972. The jurisdiction of this court is invoked under Title 28, United States Code, Section 1254(1).

QUESTIONS PRESENTED

1. Did the trial court's "accomplice instruction" constitute an equivocal direction to the jury on the basic issues involved in the case so as to violate petitioner's rights pursuant to the Sixth Amendment?
2. Did the closing argument of the prosecutor deprive the petitioner of a fair trial?
3. Did the prosecutor's repeated references to the uncontradicted evidence of the government violate petitioner's Fifth Amendment rights?
4. Did the prosecutor's closing argument prejudicially suggest an impropriety on the part of defense counsel?
5. Did the prosecutor improperly vouch for the credibility of the principal government witness in closing argument?

6. Was the petitioner prejudiced by the trial court permitting the government's principal witness to explain away his prior inconsistent statements on the basis of his fear of the petitioner even though the trial record was silent as to any basis for such alleged fear?

STATEMENT OF THE CASE

The petitioner was indicted in a two count indictment (A. 1).[1] Count One of the indictment charged the petitioner with a violation of Title 18, United States Code, Section 371, in that he conspired with William Wangard, an unindicted co-conspirator, from August 1, 1963, until June 30, 1964, to violate Title 18, United States Code, Section 1952. Count Two charged him with travelling from Chicago, Illinois, to New Orleans, Louisiana, on January 7, 1964, for the purpose of carrying on a business enterprise involving gambling in violation of Title 18, United States Code, Section 1952.

In establishing its case against the petitioner, the government relied primarily upon the testimony of the unindicted co-conspirator, William Wangard. He testified that in January, 1964, petitioner told him that he was going to use a radio transmitter that Wangard, an electronics expert, had built for him in a past-post betting scheme which would involve the placing of off-track bets with Chicago bookies (A. 12).

The plan as told to Wangard by the petitioner required three people (A. 13). One person would be inside the race track with a transmitter, the second person would

[1] All record references are to the documents filed in the United States Court of Appeals for the Seventh Circuit. "A" refers to petitioner's Appendix filed in that court. "Tr" refers to the transcript of the trial court proceedings.

be outside the track waiting in a car with a receiver on which the winning horse would be relayed while the third man would be at the defendant's apartment in Chicago waiting to receive a telephone call from the outside man naming the winning horse so a bet could be placed. Wangard agreed to assist the petitioner in carrying out this plan.

Wangard knew that petitioner was a private investigator and at first thought that the petitioner was going to use the equipment in his surveillance operations as a private investigator. He drove to New Orleans with the petitioner and was the inside man on the first day at the track (A. 14). On several other occasions he was the outside man and would relay the winning horse to petitioner's Chicago apartment by telephone. He did not know whether any bets were finalized.

After several days in New Orleans they drove to Miami because petitioner told him that none of the bets were finalized because the wire services were getting the results too fast to Chicago (A. 15). Wangard was the inside man in Miami for three days when he was told by petitioner that he had a replacement for him.

Several months later Wangard was contacted by the F.B.I. in Chicago and told that if he would cooperate he would not be prosecuted. He later told the petitioner that he had told the F.B.I. that he did not transmit or receive any race results; that he thought the petitioner was in New Orleans and Miami on some sort of industrial espionage case; that he had never made any telephone calls to give the results of any race to anyone; that he had never transmitted any race results from the Miami track; that he did not know what the petitioner was doing in New Orleans and Miami (A. 24-27).

Wangard also testified that he told these things to the petitioner because he was afraid of what the petitioner would do if he knew that he had told the truth to the F.B.I. (A. 28).

Although other government witnesses corroborated Wangard's testimony relating to the presence of petitioner and Wangard in New Orleans and Miami on the dates involved, no other witnesses testified as to the operation of the betting plan. An employee of a Chicago electronic store testified for the government that he had modified and sold some equipment to the petitioner and had also told him about the delay between the finish of a horse race and the time the wire services get the information to Chicago (A. 7-10).

Joseph McClellan, who testified as a defense witness, stated that he wired money to Wangard in Miami for his fare to return to Chicago (A. 31). He further testified that Wangard told him that he was in Florida with the petitioner working on an industrial espionage case. McClellan also stated Wangard's reputation for truth and honesty was bad.

There was no evidence that any horse bets had actually been placed during the periods alleged in the indictment.

The petitioner did not testify in his own behalf.

REASONS FOR GRANTING THE WRIT

1. THE TRIAL COURT'S "ACCOMPLICE INSTRUCTION" VIOLATED PETITIONER'S RIGHTS PURSUANT TO THE SIXTH AMENDMENT.

Notwithstanding the petitioner's objections, the trial judge instructed the jury as follows:

> "An accomplice is one who voluntarily participates in the commission or the planning of a crime.
>
> "The witness William Wangard is an accomplice of the accused in this case. As an accomplice his testimony must be closely examined and weighed with great care." (Emphasis Added)

The underscored portion of this instruction was erroneous and highly prejudicial to the petitioner in that it had the effect of advising the jury that the government had not only proven that a crime in fact had been committed but also that the petitioner was a participant in the commission of said crime. This court has long held that it is erroneous for a conviction to rest on an equivocal direction to the jury on a basic issue. The instruction, as given in the case at bar, had the effect of taking away from the jury's determination the basic issues in the case at bar, that is, whether the government had proven the crime alleged in the indictment and whether the petitioner was a participant in the commission of this crime.

In *Bollenbach* v. *United States*, (1946), 326 U.S. 607, 66 S.Ct. 402, this court stated:

> "A conviction ought not to rest on an equivocal direction to the jury on a basic issue. And a charge deemed erroneous by three circuit judges of long experience and who have a sturdy view of criminal justice is certainly not better than equivocal. The Government's suggestion really implies that, although

it is the judge's special business to guide the jury by appropriate legal criteria through the maze of facts before it, we can say that the lay jury will know enough to disregard the judge's bad law if in fact he misguides them. To do so would transfer to the jury the judge's function in giving the law and transfer to the appellate court by the jury's function of measuring the evidence by appropriate legal yardsticks.

* * * *

"In view of the Government's insistence that there is abundant evidence to indicate that Bollenbach was implicated in the criminal enterprise from the beginning, it may not be amiss to remind that the question is not whether guilt may be spelt out of a record, but whether guilt has been found by a jury according to the procedure and standards appropriate for criminal trials in the federal courts." 326 U.S. at pages 613-614.

The decision of the court below is contrary to its previous rulings concerning this type of instruction.

In *United States* v. *Balodimas*, (7th Cir. 1949) 177 F.2d 485, the trial judge, in giving an instruction relating to the credibility of an accomplice's testimony, told the jury: "The witnesses Tula Kokonas and Dianne Rontos, who have testified in this case, have openly admitted the part that they had in the commission of crime. *They may be deemed accomplices in this case . . .*" (Emphasis Added) In reversing the defendant's conviction, the Seventh Circuit held:

"In our view, they were not accomplices either as a matter of law or of fact as that term is used in criminal law. *Even if the record furnished any basis for the contention that they were accomplices*, and we think it does not, *it was a question for the jury and not the court.*" (Emphasis Added)

* * *

> "Ordinarily in a criminal trial there is no question but that a crime has been committed; the question at issue is whether it was committed by the defendant. Here, we have the reverse of that situation. The question for determination was whether a crime had been committed. The effect of this instruction was to resolve that question in the affirmative. With such a resolution there was nothing for the jury to do but to find the defendant guilty." 177 F.2d at pages 487-488.

The factual situation in the *Balodimas* case was analogous to the case at bar in that the testimony of the alleged accomplices was necessary to establish the fact that a crime had been committed and that the petitioner was a participant in its commission.

In *United States* v. *Fellabaum*, (7th Cir. 1969) 408 F.2d 220, the Seventh Circuit also stated that the giving of this type of instruction was error but due to the substantial evidence of the defendant's guilt it was not reversible error.

In the usual case, such as the *Fellabaum* case, there is no question as to whether or not a crime has been committed and the only question is whether or not the defendant was a participant. However, in the case at bar, as opposed to the factual situation in the *Fellabaum* case, there was no testimony by an intended victim of the crime alleged in the indictment, and therefore the testimony of Wangard, the alleged accomplice, was necessary to also establish the fact that a crime had been committed. Therefore, the prejudicial effect of this instruction was magnified since the jury was told that the witness Wangard had participated in the commission or planning of a crime with the defendant. Since determination of this issue should have been left to the jury, the trial judge's

instruction clearly usurped the function of the jury and effectively deprived this defendant of that type of jury trial guaranteed to him by the Sixth Amendment to the Constitution of the United States.

See *1 Devitt & Blackmar Fed. Jury Instr. 2d Ed.*, Sec. 1204, Page 257 wherein it is stated:

> "The instruction shouuld (sic) refer to 'alleged accomplice' rather than simply 'accomplice' since, by its definition of the word, the court might be accused of pre-judging the guilt of defendant under the original instruction. See *Moore* v. *United States*, 356 F.2d 39, 43 n. 2 (5th Cir. 1966). Cf.: *Washington* v. *Texas*, 388 U.S. 14, 87 S.Ct. 1920, 18 L.Ed. 2d 1019, on remand 417 S.W.2d 278 (Tex.Cr.App. 1967); *United States* v. *Johnson*, 343 F.2d 5, 6 (2d Cir. 1965)."

It is not necessary that the defendant prove that an alleged error did in fact influence a jury's verdict. In *United States* v. *Dressler*, (7th Cir. 1940) 112 F.2d 972, 978, it was stated:

> "'. . . where error occurs which, within the range of a reasonable possibility, may have affected the verdict of the jury, appellant is not required to explore the minds of the jurors in an effort to prove that it did in fact influence their verdict. * * * The record failing affirmatively to disclose that no prejudice did result, the verdict cannot stand.'"

Since the failure to give an accomplice instruction in close cases may require the granting of a new trial, *Tillery* v. *United States*, (5th Cir. 1969) 411 F.2d 644, 647-648, similarly the giving of an erroneous accomplice instruction should also require the reversal of a conviction. The Seventh Circuit has already held in *Fellabaum* that the underscored portion of the quoted instruction was erroneous.

In the case at bar only Wangard testified as to any criminality on the part of the defendant. See *United States* v. *Griffin*, (6th Cir. 1967) 382 F.2d 823, 829, wherein it was stated:

> "Conviction might probably have resulted even if the cautionary instruction had been given, but this is not the criterion. *Kotteakos* v. *United States*, *supra*, 328 U.S. at 776, 66 S.Ct. 1239 (headnote 11). Griffin had a clear right to have the issue of the informer's credibility submitted to the jury '* * * with careful instructions * * *.' *On Lee* v. *United States*, *supra*, 343 U.S. at 757, 72 S.Ct. 967. Not one witness, other than the informer Blassingame, spoke one word as to any criminality on the part of the defendant Griffin. Under these exceptional circumstances, the lawyer assigned to defend him should have requested the special cautionary instruction. We have no doubt that the District Judge in this instance would have granted the request and given the charge. But, whether emanating from the fault of the attorney or from judicial error, plain error occurred when Griffin was not accorded his right. 'Careful instructions', under the exceptional circumstances presented herein, demanded a charge as to the jury's evaluation and use of the testimony of the addicted informer. Its absence herein worked substantial prejudice to the defendant.
>
> "'* * * Had the jury convicted on proper instructions it would be the end of the matter * * *:, *Morissette* v. *United States*, *supra*, 342 U.S. at 276, 72 S.Ct. at 256, but the only way now to eradicate the omission and accord Griffin his right is to grant a new trial." 382 F.2d at page 829.

2. THE PROSECUTOR'S REPEATED REFERENCES TO THE UNCONTRADICTED TESTIMONY OF THE GOVERNMENT'S PRINCIPAL WITNESS VIOLATED PETITIONER'S RIGHTS PURSUANT TO THE FIFTH AMENDMENT. ONLY THE PETITIONER HIMSELF COULD HAVE CONTRADICTED THIS TESTIMONY.

During his closing argument the prosecuting attorney told the jury:

> "The testimony of Mr. William Wangard, our co-conspirator, the man inside, who gives us the inside view, is as clear as a bell. That is an old phrase, but it fits very well here. It is clear as the chimes of a bell on a good morning. *It is not contradicted in any way — no other version about what happened do you have before you.*" (Tr. 232) (Emphasis Added)
>
> * * * *
>
> "Ladies and gentlemen, very simply, *we submit that the testimony of Mr. Wangard is true and correct. It has never really been contradicted that anything else occurred. It is true and correct, it is believable,* and couple that with all the other facts that you have before you, *we contend that the defendant is guilty of these crimes charged beyond a reasonable doubt. There is nothing to controvert it.*" (Tr. 233-234) (Emphasis Added)

The quoted portions of the prosecutor's closing argument clearly constitute a comment upon the petitioner's failure to testify in violation of his rights pursuant to the Fifth Amendment to the Constitution. See this Court's decision in *Griffin* v. *California,* (1965) 380 U.S. 609, 85 S.Ct. 1229. These references to the uncontradicted testimony of William Wangard could have no other interpretation inasmuch as the principal portions of his testimony related to conversations between himself and the petitioner at a time when only the two of them were present. There-

fore, only the petitioner could have contradicted this testimony. Other portions of Wangard's testimony related to activity performed by him and the petitioner which only the petitioner could have contradicted. The direct testimony of William Wangard is set forth in the appendix (11a-21a).

The decision of the court below is contradictory not only to previous decisions of the Seventh Circuit but decisions of other circuits as well.

In the recent decision of *United States* v. *Flannery*, (1st Cir. 1971) 451 F.2d 880, the First Circuit stated:

> ". . . Hereafter, as to cases tried after the date of this opinion, when it is apparent on the record that there was no one other than himself whom the defendant could have called to contradict the testimony, we shall not endeavor to weigh prejudice, but shall rule it prejudicial as matter of law, with a single exception. If the court interrupts the argument, instructs the jury fully on the defendant's constitutional right not to testify and the jury's obligation not to draw unfavorable inferences and, in addition, states to the jury that the U.S. Attorney was guilty of misconduct, we may find no prejudice; otherwise we will reverse.
>
> * * * *
>
> "Particularly damaging, therefore, were several other illicit conversations at which Dionne placed only himself and the defendant.
>
> * * * *
>
> "At the trial, defendant did not take the stand. Under the circumstances the government's argument, repeated three times, that Dionne's testimony as to these private conversations was 'uncontradicted' was accurate, but a prejudicial violation of the rule under any standard. Defendant did not object, perhaps fear-

> ful of making the matter worse, and the court's failure to interrupt may have been for the same reason. The government had no right, however, to place the defendant in this dilemma." 451 F.2d at page 882.

See also *Desmond* v. *United States,* (1st Cir. 1965) 345 F.2d 225, 226-227; and *Rodriguez-Sandoval* v. *United States,* (1st Cir. 1969) 409 F.2d 529-531, wherein the First Circuit held that a similar type of closing argument was plain error within the meaning of Rule 52(b) of the Federal Rules of Criminal Procedure.

The Seventh Circuit has also condemned the practice of referring to testimony as being uncontradicted by the government in closing argument. In *United States* v. *Poole,* (7th Cir. 1967) 379 F.2d 645, the prosecutor argued in closing argument to the jury that "testimony as to the alleged purpose of the kidnapping, transportation, stood 'uncontradicted' ". In reversing the defendant's conviction for kidnapping, the Seventh Circuit stated:

> "Even though this referred to an item of testimony which could have been contradicted by one of the two witnesses, it could have called attention to Poole's failure to testify on any issue—and thus to his failure to contradict much of the testimony which could not have been contradicted by anyone but him." 379 F.2d at page 649.

The decision of the court below is also in conflict with its opinion in the recent case of *United States* v. *Handman,* (7th Cir. 1971) 447 F.2d 853. In the *Handman* case the government attorney told the jury that the case turned on a government witness's testimony which "went virtually unchallenged" and that in the "important areas", his testimony was "uncontradicted". In condemning this type of argument the Seventh Circuit stated:

"We think that the government's argument in (b) about the 'truth' of Solomon's testimony aggravated the improper comments on Handman's exercise of his Fifth Amendment right.

* * * *

"There was no evidence as to Solomon's credibility. The argument effectually introduced the prosecutor's opinion instead. It implied that the government had run a check on Solomon and determined he was speaking the truth. *Gradsky* v. *United States*, 373 F.2d 706, 710 (5th Cir. 1967). The personal opinion of a prosecutor is not an issue for the jury. *Greenberg* v. *United States*, 280 F.2d 472, 474-475 (1st Cir. 1960); *Hall* v. *United States*, 419 F.2d 582, 586 (5th Cir. 1969). See *Dunn* v. *United States*, 307 F.2d 883, 885-886 (5th Cir. 1962); see also this court's opinion in *United States* v. *D'Antonio*, 362 F.2d 151, 155 (7th Cir. 1966).

"The question is not whether the prosecutor meant 'to insinuate' that his statement was based on personal knowledge. The question is what the jury probably thought. And the cross-examination by Handman's attorney to discredit Solomon does not justify the prosecutor's replying by improper argument." 447 F.2d at page 856.

3. THE PROSECUTOR'S CLOSING ARGUMENT PREJUDICIALLY SUGGESTED AN IMPROPRIETY ON THE PART OF DEFENSE COUNSEL.

In his closing argument to the jury, the government attorney, without any basis in the evidence, told the jury:

"Mr. Thaller: Mr. Pritchard's friend McClellan testified here that he thought Wangard had a bad reputation for veracity among his friends when they discussed Mr. Wangard in bars and restaurants. That was his testimony. *I don't believe Mr. McClellan liked Mr. Wangard, and I think any defense attorney can*

go and find someone who doesn't like you or me." (A. 34-35) (Emphasis Added.)

Thereupon the following colloquy took place between the court and defense counsel:

"Mr. Rotenberg: Objection, your Honor. I think that's improper. I don't go out looking for anybody.

The Court: Well, I must caution counsel. Please, keep your conjectures within the realm of possibility.

Mr. Rotenberg: I never saw Mr. McClellan until he walked into this courtroom.

The Court: I beg your pardon?

Mr. Rotenberg: I never saw him until he walked in this courtroom.

The Court: Well, we don't want any further comment from you.

"I merely make that suggestion, Mr. Thaller, you may proceed." (A. 35)

Although defense counsel did object to the foregoing comment by the prosecutor, the trial judge did not make a ruling on his objection and did not instruct the jury to disregard the comment of the prosecutor. It would have been an exercise in futility for defense counsel to insist upon a ruling by the trial judge especially in view of the trial judge's admonition to defense counsel that "Well, we don't want any further comment from you".

Although the court below concluded in its opinion that this remark of the prosecutor was improper, it erroneously held it to be harmless. This decision is contrary to previous rulings of this court as well as of the various circuits pertaining to improprieties of government attorneys during closing argument.

In *Berger* v. *United States*, (1934) 295 U.S. 78, 55 S.Ct. 629, this court set forth the duties of the United States Attorney in a criminal trial, and stated:

> "The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the two fold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor —indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." 295 U.S. at page 88.

It is apparent from the prosecutor's comment that his zeal and desire to obtain a conviction was outrunning his duties to see that justice was done and to refrain from improper methods so as to insure a fair trial for the petitioner.

In *Hall* v. *United States*, (5th Cir. 1969) 419 F.2d 582, the Fifth Circuit, in reversing a defendant's conviction because of improper comments of the United States Attorney, stated:

> "When zeal does outrun fairness and the prosecutor makes inappropriate statements there is a multiple effect which tends to tip the scales in favor of the government. Ordinarily government counsel is, as an individual, 'properly and highly respected by the members of the jury for his integrity, fairness, and impartiality.'"

• • • •

> "Added to this is the unseen presence in the courtroom of our great and powerful government with its counsel and its voice in the person of the United States Attorney. For all these reasons his power to persuade is great. And for these reasons he must speak with the care, the decorum and the sensitivity that befit his position and his duties. Neither the heat nor the strain of trial nor the right to strike hard blows authorizes him to do otherwise." 419 F.2d at page 588.

The First Circuit, in reversing a conviction for filing fraudulent tax returns because of the prosecutor's prejudicial misconduct in closing argument, *Greenberg* v. *United States*, (1st Cir. 1960), 280 F.2d 472, stated:

> "To permit counsel to express his personal belief in the testimony (even if not phrased so as to suggest knowledge of additional evidence not known to the jury), would afford him a privilege not even accorded to witnesses under oath and subject to cross examination. Worse, it creates the false issue of the reliability and credibility of counsel. This is peculiarly unfortunate if one of them has the advantage of official backing. The resolution of questions of credibility of testimony is for impartial jurors and judges. The fact that governing counsel is, as he says, an advocate is the very reason why he should not impinge upon this quasi-judicial function. We believe the Canon (Rule 15 of the Canons of Professional Ethics of the America Bar Association) to be elemental and fundamental." 280 F.2d at page 475.

In *Ginsberg* v. *United States*, (5th Cir. 1958) 257 F.2d 950, 955, the Fifth Circuit reversed a defendant's conviction for federal tax evasion because of the improper closing argument of the prosecutor who stated that he could probably have fifty people testify that the defendant's character was not good.

The opinion of the court below is also in conflict with its earlier decision in *United States* v. *Guajardo-Melendez*, (7th Cir. 1968) 401 F.2d 35, 40, wherein the Seventh Circuit reversed a narcotic conviction because of improper comments made by the prosecutor in his closing argument that was not based upon any testimony presented during the trial.

In *Reidy* v. *State*, 8 Md.App. 169 (1969), the defendant's second degree murder conviction was reversed because the prosecutor told the jury "there is really no self-defense. It is a fiction manufactured by the defense counsel." In holding that this statement was prejudicial, the court stated:

> "We do know, however, that self-defense was the heart and soul of appellant's defense, and that the prosecutor's remarks had a clear tendency, particularly when not neutralized by the trial judge, to convey the thought to the jury that defense counsel suborned perjury, or that he fabricated the defense, or that the defendant himself committed perjury in testifying that he committed the homicide in self-defense. With the case in this posture, it went to the jury and while it would appear from the record that appellant's claim of self-defense had little support in the evidence, nevertheless, as observed in *People* v. *Saylor*, 149 N.E. 767 (Ill.), involving a not dissimilar issue, '[c]onviction should be the result of a fair trial and not of the conclusions which a court of review may reach from a consideration of the evidence contained in the record where there has not been a fair trial.'" 8 Md.App. at page 179.

The courts have held that the misconduct of the prosecutor cannot be cured by the fact that the sufficiency of the evidence to establish guilt is present. See *Dugan*

Drug Stores, Inc. v. *United States*, (5th Cir. 1964) 326 F.2d 835, 837.

The prosecutor's comment was especially prejudicial in the case at bar since it suggested an impropriety on the part of defense counsel by implying that he had improperly sought Mr. McClellan's testimony and that it was fabricated with the knowledge and sanction of defense counsel. This statement of the prosecutor cannot be deemed harmful inasmuch as it effectively tended to destroy Mr. McClellan's corroboration of the defense theory that the petitioner was in New Orleans and Miami, Florida on an industrial espionage case. His testimony was extremely vital to the defense because it contradicted Wangard's testimony to the effect that he was not telling the truth when he told the petitioner that he had told the FBI that he was in New Orleans and Miami with the petitioner whom he thought was on some sort of industrial espionage case.

Furthermore, the key issue in the case at bar was the credibility of Wangard, and the testimony of Mr. McClellan was offered for the purpose of showing that Wangard's reputation for truth and veracity was bad.

4. THE PROSECUTOR IMPROPERLY VOUCHED FOR THE CREDIBILITY OF ITS PRINCIPAL WITNESS.

The principal witness for the government was William Wangard, and his testimony consisted primarily of conversations between himself and the petitioner as well as activities performed by him with the petitioner. The closing argument of the prosecutor quoted on page 11 of this petition was improper for the reason that the prosecutor was in effect telling the jury that the United States government was vouching for the honesty and veracity of its principal witness.

There are numerous decisions holding that government counsel are not permitted to express their personal opinion as to the trustworthiness of the government's evidence and the consequent guilt of a defendant. Arguments of this nature, especially in close cases, as the case at bar, are prejudicial because they have the effect of leading the jury to believe that the opinion of the prosecutor is based upon other evidence, known to the prosecutor but not introduced, which justifies his belief. See *Gradsky* v. *United States*, (5th Cir. 1967) 373 F.2d 706, 710; *McMillian* v. *United States*, (5th Cir. 1966) 363 F.2d 165, 168; *United States* v. *White*, (2nd Cir. 1963) 324 F.2d 814, 816; *United States* v. *Handman*, (7th Cir. 1971) 447 F.2d 853.

In a very recent case, *United States* v. *Brown*, (5th Cir. 1971) 451 F.2d 1231, the Fifth Circuit stated as follows:

> "As we have stated above the government concedes that it was error for counsel to vouch for this government witness. However, it is contended by the United States that this was harmless error and it should be overlooked. This court has passed too many times on this kind of comment by prosecutors to permit it to continue by allowing it to be brushed under the rug under the harmless error doctrine. See *Gradsky* v. *United States*, 5 Cir., 373 F.2d 706; *Lawn* v. *United States*, 355 U.S. 339, 78 S.Ct. 311, 2 L. Ed. 2d 231; *McMillian* v. *United States*, 363 F.2d 165 (5th Cir. 1966); *Dunn* v. *United States*, 307 F.2d 883 (5th Cir. 1962) and *Steele* v. *United States*, 222 F.2d 628 (5th Cir. 1955).
>
> "There is absolutely no justification for the reference to the danger undertaken by Wilder for working as an undercover agent and, of course, as we have said in the cases cited above, it was improper for government counsel to state that he personally felt

> the agent did 'a real good job' or that he felt that 'he was doing his duty to his country' and finally that work he was doing 'was successful in my opinjon.'" 451 F.2d at page 1236.

This type of argument in the case at bar was especially prejudicial to the petitioner inasmuch as the prosecution's case rested entirely upon whether or not the jury believed the testimony of William Wangard.

5. THE TRIAL COURT ERRED IN PERMITTING A WITNESS TO EXPLAIN HIS PRIOR INCONSISTENT STATEMENTS ON THE BASIS OF FEAR.

On redirect examination, over the petitioner's objections, the government's principal witness Wangard was permitted to testify that the reason his statements to the petitioner as to what he had told the F.B.I. were inconsistent with what he had actually told the F.B.I. was because he was afraid of what the petitioner might do to him if the petitioner knew that he had told the F.B.I. the truth.

This testimony had no probative value whatsoever as it was not relevant or material to the charges contained in the indictment. At the same time it was highly prejudicial to the petitioner's right to receive a fair trial in that it tended to confuse the issues and create the impression that the petitioner was a person of violence notwithstanding the fact that there was no evidence in the record upon which the jury could properly draw such an inference. There was no showing that the petitioner had ever exerted or threatened any physical force, duress or any other undue influence upon the witness prior to or during their meeting.

The cases relied upon by the Seventh Circuit are not applicable to the factual situation of the case at bar for

the reason that in each of the cases relied upon by the court below, the witness demonstrated to the trial judge a basis for the fear expressed.

In *United States* v. *Scandifia*, (2nd Cir. 1968) 390 F.2d 244, the court stated at page 250:

> "During the cross-examination of Irving Cohen, defense counsel brought out that Cohen originally had told agents of the Federal Bureau of Investigation that he had obtained the counterfeit bonds from a 'Mr. Schweikert.' Cohen had testified that he had mentioned 'Schweikert' under instructions from Scandifia and, on redirect, *he explained that he had obeyed because '[m]y family had received threatening phone calls. * * * [and f]or fear of my family's life, knowing* Mr. Scandifia's background.'" (Emphasis Added)

Another case relied upon by the court below is *Carbo* v. *United States*, (9th Cir. 1963) 314 F.2d 718, 743-744. In that case a government witness was permitted to explain that his actions arose out of fear based upon threatening phone calls that had been received by him.

In the third case relied upon by the court below, *United States* v. *Franzese*, (2nd Cir. 1968) 392 F.2d 954, the court conducted a hearing outside the presence of the jury to permit the witness to explain the basis of his fears. See Page 959 of the opinion wherein it is stated:

> "The Government then made known to the court that it proposed to rehabilitate Smith by showing that his previous silence as to the defendants was due to fear. After requesting counsel to prepare memoranda over a weekend, Judge Mishler said that his own search had led him tentatively to conclude that a witness may explain an inconsistency on the basis of fear even if his doing so imparts evidence of another crime, but that the trial judge has an obligation to allow 'only so much * * * as will explain

> his fears' and to 'exclude any other matter that * * * will lead the jury away from these issues and in effect decide the character of other crimes of these defendants.' After much discussion it was decided to conduct a hearing outside the presence of the jury, at which Smith would explain the basis of his fears."

In the case at bar there was no explanation whatsoever by the witness Wangard as to the basis for his alleged fear nor was there any evidence that the petitioner had ever threatend him or his family or made any statements whatsoever to him which should be considered as establishing a basis for his alleged fear.

The trial court should proceed very cautiously prior to permitting such inflammable evidence to be heard and considered by the jury; and in the event, as was the case here, the probative value of the evidence is substantially outweighed by the risk that its admission will create a substantial danger of undue prejudice or of confusing the issues or of misleading the jury, the trial judge should exclude this type of evidence. See *Frank* v. *United States*, (D.C. Cir. 1958) 262 F.2d 695, 697.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari to review the judgment of the Court of Appeals for the Seventh Circuit should be granted.

Respectfully submitted,

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Chicago, Illinois 60603
Attorney for Petitioner.

APPENDIX

IN THE

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

SEPTEMBER TERM, 1971 — SEPTEMBER SESSION, 1971

No. 18341

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
WALTER PRITCHARD, a/k/a WALTER O'ROARKE,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 68 CR 714

WILLIAM J. LYNCH, *Judge.*

FEBRUARY 2, 1972

Before CASTLE, *Senior Circuit Judge,* and KILEY and STEVENS, *Circuit Judges.*

CASTLE, *Senior Circuit Judge.* Walter Pritchard, the defendant-appellant, prosecutes this appeal from a judgment order of conviction and sentence entered by the District Court following defendant's trial before a jury on a two-count indictment charging him with conspiracy[1] to violate 18 U.S.C.A. §1952, and with a substantive offense in violation of that Section. The jury found the defendant guilty as charged, and the court imposed a general sentence of three years imprisonment and a fine of $5000.

[1] In violation of 18 U.S.C.A. §371. William Wangard was named as an unindicted co-conspirator.

The defendant predicates the existence of trial error which requires a reversal of his conviction on his contentions that the District Court erred in denying his pretrial request for a hearing to determine if defendant was prejudiced by pre-indictment delay; in the admission of a witness' testimony concerning his state of mind; in the giving and the refusal to give certain instructions to the jury; and that the prosecutor's closing argument was improperly prejudicial to the defendant.

The indictment was filed November 25, 1968, and a bench warrant for defendant's arrest was issued the same date. Count One charges the defendant with conspiracy which is alleged to have begun on or about August 1, 1963, and to have continued until on or about June 30, 1964. Count Two charges a substantive violation of 18 U.S.C.A. §1952 on or about January 7, 1964. Thus there is an interval of almost four and one-half years between the alleged criminal activities and the return of the indictment. Prior to trial the defendant filed a motion to dismiss the indictment grounded on the assertion, *inter alia*, that this pre-indictment delay was a violation of his Sixth Amendment right to a speedy trial and of his Fifth Amendment right to due process. The motion asserted that:

> ". . . as a result of this unreasonably oppressive and unjustifiable delay, this defendant will be seriously hampered and prejudiced in preparing a proper defense and assisting his counsel in preparing a defense to the charges of this indictment."

The motion concluded with a prayer that the indictment be dismissed, "or in the alternative that this Court conduct a pretrial hearing to determine whether the delay of over four and one-half years in instituting this prosecution was prejudicial to the defendant". The District Court denied the motion in its entirety.

Following the briefing and oral argument in this appeal the Supreme Court of the United States handed down its opinion in *United States* v. *Marion*, ... U.S. ..... (No. 70-19, Opinion filed December 20, 1971, 40 Law Week

4092). In *Marion* it is held that there is no need to press the Sixth Amendment into service to guard against the mere possibility that pre-accusation delays will prejudice the defense in a criminal case since statutes of limitation already perform that function. Here, as in *Marion*, the delay between the end of the scheme charged in the indictment and the date the defendant was indicted did not extend beyond the period of the applicable statute of limitations,[2] and the defendant was not arrested, charged, or otherwise subjected to formal restraint prior to indictment. It was the indictment, therefore, which transformed Pritchard into an "accused" who is subject to the speedy trial protections of the Sixth Amendment.

In rejecting the claim of violation of the Fifth Amendment right of due process asserted in *Marion* the Supreme Court pointed out that the statute of limitations does not fully define a defendant's rights in the context of pre-indictment delay. But the Court did not reach the issue as to when and in what circumstances actual prejudice resulting from a pre-accusation delay may require the dismissal of the prosecution. In this connection the Court observed that on the record before it "no actual prejudice to the conduct of the defense is alleged" and that "at the present time appellees' due process claims are speculative and premature". Accordingly, in *Marion* the Court reversed the district court's dismissal of the indictment there involved. In the instant case the defendant's assertion of prejudice is a wholly conclusory allegation. No specific actual prejudice is factually alleged. The rationale of *Marion* is equally applicable here. Mere "delay" does not equate with "actual prejudice". And, the defendant alleged nothing in his motion which entitled him to an evidentiary hearing on an issue of actual prejudice alleged to have resulted from the delay. His motion speaks only of a potential prejudice predicated on the pre-indictment delay itself. Moreover, no actual prejudice was shown at the ensuing trial. *Cf. United States* v. *Lee*, 7 Cir., 413 F. 2d 910.

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[2] 18 U.S.C.A. §3282.

Wangard, the unindicted co-conspirator, testified for the government. His testimony may be summarized as follows. In January 1964 the defendant and Walter Wangard traveled from Chicago, Illinois, to New Orleans, Louisiana, and from there to Miami, Florida, for the purpose of effectuating a past-post betting scheme which would involve the placing of off-track bets with Chicago bookies. The scheme was designed to take advantage of the time lag between the time a race is run at one place and the information gets to Chicago via the wire services. The plan required three people. One would be inside the track with a transmitter, the second person would be outside the track in a car with a receiver awaiting the race result from the inside man, and upon its receipt would then telephone defendant's apartment in Chicago to relay the name of the winning horse to a third person who was to place the bet. Wangard, who was an electronics design engineer, built the electronic equipment for the defendant. He was aware that the defendant was a private investigator who engaged in surveillance work. When the defendant asked him to build the receiver-transmitter pair used in the operation it was his first impression that the defendant intended to use it in surveillance operations. The defendant later explained his past-post betting scheme and asked Wangard to join in it. On the first day at New Orleans Wangard acted as the inside man. The next few days he acted as the outside man. He received the defendant's transmission from the track and relayed the result of the race by telephone to Chicago to the party who was to place the bet. They left New Orleans for Miami after the defendant told Wangard that none of the attempted bets were being finalized because the wire services were too fast in getting the race results to Chicago. At Miami Wangard was exclusively the inside man. After he had so acted for three days the defendant told him he had found a replacement for him. Wangard then returned to Chicago. He was subsequently contacted by the FBI and told that if he cooperated he would be called as a witness but not prosecuted. The defendant later questioned Wangard concerning what Wangard

had told the FBI. Wangard told the defendant that he had told the FBI that he did not transmit or receive any race results; that he thought the defendant was in New Orleans and Miami on some sort of industrial espionage work; that the witness' work there was strictly technical as far as the electronic equipment was concerned; and that he had been left alone a lot of the time, and had gone to the race track because he had nothing better to do. Wangard further testified that he told those things to the defendant because he was afraid of what the defendant might do if the defendant knew that the witness had told the FBI the truth.

Other government witnesses gave testimony which corroborated Wangard's testimony insofar as it related to the presence of the defendant and Wangard in New Orleans and Miami on the dates involved. And an electronics technician who had modified some walkie-talkie equipment for the defendant testified with respect to two conversations with the defendant in October of 1963 relating to the time differential between the finish of a horse race and the time the wire services get the information to Chicago. The witness stated that in the second conversation the defendant inquired concerning the feasibility of using a citizen's band radio for transmitting information from a race track, and that the witness advised the defendant that it would be a highly dangerous operation because the citizen's band is monitored by both the FCC and the race track operators. In response to further questions the witness advised the defendant that other equipment could be built which would be safer to use.

The evidence on the defendant's behalf consists of the testimony of Joseph McClellan who had advanced money to Wangard for his return to Chicago from Miami. He knew Wangard as a patron of a tavern the witness operated. The witness stated that when Wangard telephoned him to request the money Wangard stated that he was in Florida working on an industrial espionage case with the defendant. The witness further testified that Wangard's reputation for truth and honesty was bad.

The defendant contends that the trial court erred in permitting the government's witness Wangard to testify on re-direct examination, over the defendant's objection, that the reason his statements to the defendant as to what he had told the FBI were inconsistent with what he had actually told the FBI was because he feared what the defendant might do if the defendant knew he had told the truth to the FBI. The defendant argues that this testimony as to the witness' state of mind had no probative value as to any relevant or material issue and permitted an inference prejudicial to the defendant without any foundation *that the defendant had in any manner threatened* the witness. We perceive no error in the trial court's ruling. On cross-examination Wangard had been questioned about his conversations with the defendant after Wangard had been interviewed by the FBI. Wangard had admitted making statements to the defendant which were inconsistent with Wangard's testimony on direct examination. The prior statements of the witness inconsistent with his trial testimony were elicited on cross-examination and constituted an attempt to impeach the witness. Under these circumstances the government was entitled to have the witness explain the inconsistency. *United States* v. *Scandifa*, 2 Cir., 290 F. 2d 244; *Carbo* v. *United States*, 9 Cir., 314 F. 2d 718; *United States* v. *Franzese*, 2 Cir., 392 F. 2d 954, vacated on other grounds, 394 U.S. 310.

The defendant contends that the court erred in its instruction relating to the credibility of an accomplice witness because in defining an accomplice as one who voluntarily participates in the commission or planning of a crime it incorporated the statement that "the witness William Wangard is an accomplice of the accused in this case". For the reasons stated in *United States* v. *Fellabaum*, 7 Cir., 408 F. 2d 220, where an identical instruction was given, we reject the contention of the defendant that the instruction requires a reversal of the defendant's conviction. Likewise, the instructions given by the court relative to the determination of the credibility of witnesses and the weight to be given a witness' testimony, and which were given in juxtaposition with the instructions on accomplice testimony, were

such that on this record it is our opinion that the court did not err in refusing to give the specific instruction covering the same subject tendered by the defendant. Where the jury is fully and fairly instructed upon the case as a whole it is unnecessary to give any specific instruction in the precise form requested by the defendant. *United States* v. *Pike*, 7 Cir., 158 F. 2d 46, 51; *United States* v. *Donovan*, 7 Cir., 339 F. 2d 404, 410. Nor, in our judgment, did the court err in refusing to give the "theory of defense" instruction tendered by the defendant. Not only was the proposed instruction argumentative in form, but it was also without adequate foundation in the evidence. It was based only on tangential references in the testimony that the defendant's occupation was that of private investigator, upon Wangard's admitted fabrication in advising the defendant that Wangard had told the FBI that the presence of the defendant in New Orleans and Miami was for the purpose of industrial espionage, and Wangard's similar statement to McClellan when he telephoned from Florida for money. Insofar as evidence to support a conclusion that the defendant's interstate travel and his subsequent activities in New Orleans or Miami were related to industrial espionage work is concerned, the record is barren.

In its argument to the jury the government in commenting upon the testimony of Wangard characterized it as being "true and correct, it is believable" and stated "there is nothing to controvert it". No objection was interposed by the defendant. We recognize that there are situations where a remark similar to the latter, *i.e.*, that a witness' testimony is uncontradicted, has been held to constitute prejudicial error requiring a reversal. It was so recognized in *United States* v. *Handman*, 7 Cir., 447 F. 2d 853, where it was apparent from the record that there was no one other than himself whom the defendant could have called to contradict the testimony, the remark was objected to, and no cautionary instruction given the jury to disregard it. Under such circumstances such a statement by the prosecution amounts to prejudicial comment on the defendant's failure to testify, and it falls within the purview of the interdiction contained in *Chapman* v. *California*,

386 U.S. 18. In this connection see also the admonition recently given in *United States* v. *Flannery*, 1 Cir., ... F. 2d ..... (No. 71-1199 — Opinion dated November 12, 1971). But in the instant case it is not indicated that no one other than the defendant could have contradicted Wangard's testimony. And, viewed in its context, the remark that the witness' testimony was true and believable was not an improper vouching for a witness' testimony such as was condemned by this Court in *United States* v. *D'Antonio*, 7 Cir., 362 F. 2d 151, 155. See: *Lawn* v. *United States*, 355 U.S. 339, 359, footnote 15. Thus there is no basis for concluding, on this record, that either of the remarks constituted plain error requiring a reversal pursuant to Rule 52, Fed. Rules of Crim. Proc.

During the closing argument the prosecutor in commenting upon McClellan's testimony with respect to Wangard's reputation for veracity stated: "I don't believe Mr. McClellan liked Mr. Wangard, and I think any defense attorney can go and find someone who doesn't like you or me". The defendant objected and the court cautioned the prosecutor to keep his conjectures within the realm of possibility. The defendant urges that we reverse on the basis that the prosecutor's comment prejudicially suggested an impropriety on the part of defense counsel. The remark of the prosecutor was improper, but in the context of the court's admonishment to counsel we see no basis for concluding that the incident was of particular significance. The observation in *Glasser* v. *United States*, 315 U.S. 60, 83, that we "must guard against the magnification on appeal of instances which were of little importance in their setting" is apposite here. And, as pointed out by this Court long ago in *United States* v. *Goodman*, 7 Cir., 110 F. 2d 390, 395:

> "It is only fair to jurors to assume that they do not always take counsel as seriously as counsel, in the heat of argument, take themselves."

The judgment order of conviction and sentence entered by this District Court is affirmed.

AFFIRMED.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

March 10, 1972.

Before

Hon. Latham Castle, Sr. Circuit Judge

Hon. Roger J. Kiley, Circuit Judge

Hon. John Paul Stevens, Circuit Judge

United States of America, Plaintiff-Appellee, No. 18341 vs. Walter Pritchard, a/k/a Walter O'Roarke, Defendant-Appellant.	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division (68 CR 714)

On consideration of the petition for rehearing and suggestion that it be heard *en banc* filed in the above-entitled cause, no judge in active service having requested a vote thereon, nor any judge voted to grant the suggestion, and all members of the panel having voted to deny a rehearing.

It Is Ordered that the petition for a rehearing in the above-entitled cause be and the same is hereby denied.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

March 20, 1972.

Before

Hon. Latham Castle, Circuit Judge

United States of America,
Plaintiff-Appellee,

No. 18341 vs.

Walter Pritchard, a/k/a Walter O'Roarke,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

On consideration of the motion of counsel for defendant-appellant to stay mandate, together with memorandum in support thereof,

It Is Ordered that the mandate of this Court be stayed to and including April 10, 1972, in accordance with the provisions of Rule 41(b) of the Federal Rules of Appellate Procedure.

52 * * * WILLIAM WANGARD, called as a witness herein for and in behalf of the Government, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Thaller.

Q. Please state your name and spell your last name for the court reporter.

A. William Wangard, W-a-n-g-a-r-d.

Q. Mr. Wangard, where do you live?

A. I live at 2024 South Second Avenue in Maywood, Illinois.

Q. Are you married, sir?

A. Yes, sir, I am.

Q. Do you have any children?

A. Yes, sir, I have two.

53 Q. Where are you employed, sir?

A. I am employed at the Gulbransen Company, a subsidiary of Seeburg Corporation.

Q. Do you have a college degree, sir?

A. Yes, I have.

Q. What is that in?

Mr. Rotenberg: Objection, your Honor, immaterial.

The Court: Overruled, he may answer.

By the Witness:

A. I have a degree in physics and mathematics.

By Mr. Thaller:

Q. From where?

A. Lake Forest College.

Q. Do you know the defendant Walter Pritchard?

A. I do.

Q. Do you see him here in the courtroom?

A. Yes.

Q. If you see him, could you point him out, please?

A. The gentleman over there with the black and red tie.

Mr. Thaller: Your Honor, may the record show that the witness has pointed out the defendant?

54 The Court: It may so show.

By Mr. Thaller:

Q. How long have you known Mr. Pritchard?

A. I first met Wally about the early part of 1962.

Q. And did you know him socially, or was it a business relationship?

A. Well, at first it was a very—well, a very casual social relationship. We knew each other to talk to each other and that's about it, and then later on the relationship changed to a business and social.

Q. I see.

Did you have any contact with Mr. Pritchard in the summer of 1963?

A. Yes, I did.

Q. What contact was that?

A. Well, he had asked me to—I was doing some work for him in the realm of electronics, mostly consulting and doing a few building—building a few things for him, and then he asked me to build him a—or to modify a tape recorder to record telephone conversations.

55 Mr. Rotenberg: Your Honor, the witness has a tendency to drop his voice. I am having difficulty hearing him.

The Court: Yes, please keep your voice up so that counsel may hear you, and also the jury.

The Witness: Yes, sir.

Mr. Rotenberg: Thank you, your Honor.

The Court: Very well.

By Mr. Thaller:

Q. You say you modified a tape recorder for him?

A. I did.

Q. And what did this consist of?

Mr. Rotenberg: Objection, your Honor. I don't see the relevancy to the charges in this lawsuit.

Mr. Thaller: Your Honor, we will connect this up.

The Court: Overruled. He may answer subject to your subsequent motion, if it be proper.

By the Witness:

A. The tape recorder was modified so that the recorder would be on, but in a standby position, and when it
56 was connected to a telephone line, when the receiver was lifted from the hook, the recorder would begin to operate and record the telephone conversation.

By Mr. Thaller:

Q. Did you build any other equipment for Mr. Pritchard?

A. Yes, I did.

Q. What was that?

A. Well, he asked me to build a transmitter-receiver pair later on in the fall, capable of transmitting distances of one to ten miles, voice. It was—the transmitter was to be able to be carried on a person.

Q. And did you build this transmitter-receiver for him?

A. Yes, I did.

Q. Did you turn it over to him?

A. Not directly. I mailed it to him.

Q. Where did you mail it to him?

A. Well, he called me on the phone at work one day, identified himself and asked me to mail it to him to an address in Miami, where he was, where he said he was.

57 Mr. Rotenberg: Objection, your Honor.

Once again, I don't see the relevancy of this, and I move that it be stricken.

The Court: The motion will be overruled at this time. It may be renewed at a later time, if you so desire, Mr. Rotenberg.

Go ahead, counsel.

By Mr. Thaller:

Q. After you mailed him that transmitter-receiver, did you have any contact with Mr. Pritchard?

A. Yes, I did. He called me in a few days and said it hadn't gotten there, and we waited a few days further. He called me again and asked me to build him another one.

Q. And did you build him another one?

A. Yes, I did.

Q. What did you do with that one?

A. I mailed it to the Miami address also.

Q. About what time of the year was this?

A. Oh, this was late November, early December 1963.

Q. Subsequent to sending him the second transmitter receiver, did you hear from him?

58 A. Yes, I did.

Q. Was this in person or on the telephone?

A. It was on the telephone. He called me and told me he had received it, but that it wasn't working properly, and he asked what he could do, and I asked him to try a few things, which didn't work, so he came back to Chicago.

Q. When was this?

A. This was about mid-December 1963.

Q. And did you meet with him at that time?

A. Yes, I did.

Q. What did you do?

A. Well, we worked on the—we worked on the transmitter and receiver combination, and we were unable to get the range that we had anticipated from the unit.

Q. Were you ever at Mr. Pritchard's home?

A. Oh, yes, many times.

Q. Where was it?

A. He had an apartment in the 400 block on West Surf Street.

Q. Could you tell us what kind of an apartment it was?

A. A one-bedroom apartment.

59 Q. Did anyone else live there?

Mr. Rotenberg: Objection, your Honor.

The Court: Just a moment, please. Would you read the question to me, Mr. Reporter? I was distracted.

Mr. Rotenberg: Well, I will withdraw the objection, your Honor.

The Court: Very well; the objection is withdrawn. You may answer.

By Mr. Thaller:

Q. Did anyone else live there with him?

A. Marianne, his wife.

Q. Do you know, to your own knoweldge, did he have a telephone?

A. Yes, I do. He did.

Q. Do you know how many telephones he had?

A. Well, he had one telephone all along, and then he had another one installed about the latter part of 1963.

Q. Could you recall where these telephones were situated?

A. Yes, they were situated in the living room.

Q. Both of them?

A. Yes.

60 Q. Do you know the number of either of these telephones?

A. I know the number of only one of the phones. It was 477-8269.

Q. Around the first of the year 1964, what was your employment situation?

A. Well, at that time—well, for the previous three years I had been working for Magnaflux Corporation, and they had expected some government contracts which never materialized.

Mr. Rotenberg: Objection, your Honor. This is not responsive to the question.

The Court: Mr. Reporter, would you read it to me, please.

The Witness: My department had—

The Court: Just a moment.

(The last question and answer were read by the reporter.)

The Court: That may be stricken as not being apropos or responsive to the question and the jury will disregard it.

By Mr. Thaller:

Q. Around the first of the year were you employed or unemployed?

61 A. I was laid off.

Q. Around the first of the year '964, did you have a conversation with the defendant Walter Pritchard?

A. Yes, I did.

Q. Where did this occur?

A. At his apartment.

Q. Was anyone else present?

A. Well, outside of Walter and myself, Marianne I think was present.

Q. What did he say to you and what did you say to him?

A. Well, at that time he told me what he was planning on using the transmitter-receiver combination for, which was a past-post betting operation.

Mr. Rotenberg: Objection to the summarization, your Honor. I would like to have what the conversation was.

The Court: That objection is sustained.

Please state the conversation rather than a summarization of it.

Mr. Rotenberg: And I move that it be stricken.

The Court: Sustained.

62 By Mr. Thaller:

Q. What did he say to you and what did you say to him?

A. Well, he told me that he was going to use the receiver-transmitter combination in a past-post betting scheme which would involve three people—one person would be inside a track with a transmitter, the second person would be outside the track in a car, and a third person would be in Chicago or elsewhere, waiting to receive a telephone call from the man outside the track as to the winner of a race, which would be transmitted by the man inside the track with the transmitter.

Q. What was the third man to do?

A. The third man was to dial six of the seven numbers of a bookie's number, and when he received the winner from the—the winner of the race from the outside man at the track, he would then dial the seventh number and attempt to place a bet on the race before the bookie's wire service had gotten the results of that race.

Q. Did he tell you who the third man was?

A. Not at that time, no.

63 Q. After he explained the past-post betting scheme, did he say anything else?

A. He said that as long as I wasn't—wasn't working, that he would like me to come down to New Orleans to help him set up the—set up and make sure everything was working properly.

Q. And did you accept his offer?

A. Yes, I did.

Q. And did you participate?

A. Yes I did.

Q. Was any payment promised?

A. Nothing other than a vague "I'll take care of you."

Q. Did you, in fact, depart Chicago?

A. Yes, we did.
Q. On what date was that?
A. We left on the 7th of January, 1964.
Q. Now, when you say "we"—
A. Walter and I left from his apartment in his car.
Q. What kind of car was that?
A. It was a 1963 Chrysler 300.
Q. And where did you go?
A. We went to New Orleans.
Q. When did you arrive in New Orleans?
64 A. We arrived in New Orleans the next day. It was on the 8th of January.
Q. What did you do, if anything, when you arrived in New Orleans?
A. Well, we first went around—we went to the Fairgrounds Race Track there and scouted the area, and looked around for some—for some likely telephones outside the tracks—outside the immediate vicinity of the tracks.
Q. Then what did you do?
A. Then we checked into a motel?
Q. Did you do anything else that day?
A. Well, later that evening, after we had been settled in the motel, we checked out the radio equipment.
Q. Now, did you at any time—did you and Mr. Pritchard at any time put this past-posting plan into operation?
A. Yes, on the very next day I was the inside man at the track.
Q. What date was that?
A. That was on the 9th.
Q. What procedure did you follow?
A. Well, as I outlined before, I was witnessing
65 the race, and when the winner was announced or when the winner was evident, either by leading by so much or after they finally posted the winners, I would announce —I would transmit the name of the winning horse over the transmitter.
Q. Now, did you actually transmit a name over the transmitter?
A. No, we did not.

Mr. Rotenberg: Objection to the form of the leading question, your Honor. He should ask him what he did.

The Court: Well, that is true, but I will let it stand. It is overruled.

He may answer, if he can.

By The Witness:

A. No, we did not. The horses on the—one of the sheets is listed by number. All the horses for all the races that day are listed by number, and we had a letter code corresponding by that number. It was "Cant Flick Gory"—C-A-N-T F-L-I-K G-O-R-Y—and I would then transmit one of the letters corresponding to the winning horse.

For example, if the No. 1 horse won, I would transmit the letter C.

66 By Mr. Thaller:

Q. If the first horse won?

A. Yes.

Q. Were you always the inside man in this operation?

A. No, on two or three occasions I was the outside man.

Q. What procedure did you follow then?

A. I followed the procedure—well, Wally told me then to cruise around the track, go anywhere, but within three or four minutes of post time, the listed post time in the paper, I was to go to a telephone and dial Chicago. I dialed his apartment in Chicago.

Q. What number was that?

A. That was the 477-8269 number.

Q. Then what did you do?

A. And I was to ask for Ray, and he acknowledged, and then I would go back to the car and listen for the results of the race to come over the receiver.

Q. Then what would you do?

A. Then what I heard—when I heard the letter, I

67 was to transcribe it into the—transfer it into terms of the number of the winning horse as appeared in the paper, and then this—I would relay this to Ray in Chicago by means of an insurance-type statement.

For example, "Settled claim for $200" would mean the No. 2 horse won.

Q. Do you personally, if any bets were finalized?

A. Not from my own knowledge, no.

Q. Were you ever told by the defendants if any bets were finalized?

Mr. Rotenberg: Objection again to the form of the leading questions, your Honor.

The Court: Yes. Counsel, please do not lead him.

Mr. Thaller: Yes, sir.

The Court: It is sustained.

By Mr. Thaller:

Q. How often did you carry out this scheme in New Orleans?

Mr. Rotenberg: Your Honor, I am going to object to his referring to it as a scheme. I believe that is up
68 to the jury to decide whether it is a scheme or not.

The Court: The objection is overruled.

Mr. Rotenberg: I object to his characterizing it.

The Court: The objection will be overruled. He may proceed.

By The Witness:

A. Well, we—we were in New Orleans for about six days all together, and then we carried out the scheme about four of those days, four or five, about five of the days we were there. I was the outside man on a couple of occasions, starting the 11th. We carried out the same pattern during all those days.

On the 10th we had some difficulty, the 11th—the 12th there were no races because it was a Sunday—and the 13th, 14th and 15th. It was a continuing thing. It was kind of hard to determine actually what—we may not have done it one of those days, but it was—

Mr. Rotenberg: Excuse me, your Honor, I am sorry, but I can't hear him.

The Court: I couldn't either. Please keep your voice up.

69 By The Witness:

A. We may not have done it one of those days, but it was a regular continuing thing while we were down there.

By Mr. Thaller:

Q. How many races would you cover a day?

A. Normally around six.

Q. Did there come a time when you departed New Orleans?

A. Yes.

Q. What date was that?

A. We left on the afternoon of the 16th of January.

Q. Prior to your departing New Orleans, did you have a conversation with the defendant Walter Pritchard?

A. Yes, I did.

Q. Where did this conversation take place?

A. In our motel room.

Q. And who was there?

A. Just he and I.

Q. What did he say and what did you say?

A. Well, he told me that none of the bets were
70 being finalized, and he knew this because he had connected the other telephone in his apartment to the tape recorder which I had built for him previously, and that Ray—if that's his name—would place a bet on that telephone and it would then be recorded, and Marianne in the evening when she came home from work would listen to the recording and let him know what the—if a bet had been actually placed, and he told me at that time that we didn't have any luck because the wire services were getting the results too fast and that we would probably have better luck in Miami where the race results were delayed for about thirty minutes after every race.

Q. And did you depart New Orleans?

A. Yes, we did.

Q. When was that?

A. On about the 16th we left for Miami, Florida.

Q. When you referred to "we", who was that?

A. Wally and myself.

Q. How did you travel?

A. We traveled in his car.

Q. Where did you go?

A. We went to Miami.

71 Q. When did you arrive in Miami?

A. On the 17th. We arrived, and we immediately went to Hialeah and had a test run with the equipment.

Q. Do you recall—did you stay anywhere in Miami?

A. Yes, we stayed at one motel and then we shifted to another one. I can't remember the reason why or anything.

Q. Did you and the defendant operate this past-post betting plan in Miami?

A. Yes, we did.

Mr. Rotenberg: Objection again, to the characterization, and I move that it be stricken.

The Court: No, I think there is sufficient evidence in the record. Overruled. It may stand.

By Mr. Thaller:

Q. What was your procedure in Miami?

A. It was essentially the same as New Orleans, except that I was exclusively the inside man there.

Q. How long did you take part in the operation in Miami?

A. About three days.

72 Q. What did you do then?

A. Well, on the evening of the 20th, or the morning of the 21st, Wally had told me that he had contacted somebody in Miami who would take my place, and I was rather anxious to get home, so I left from Miami to Chicago on that day.

Q. On what day?

A. On the 21st.

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WALTER PRITCHARD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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Solicitor General;

HENRY E. PETERSEN,
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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on February 2, 1972. A petition for rehearing was denied on March 10, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, in instructing the jury with regard to the credibility of accomplice testimony, the trial

court committed reversible error by referring to the government's principal witness as "an accomplice of the accused in this case."

2. Whether the prosecutor was guilty of misconduct in his closing argument.

3. Whether the trial court erred in permitting a government witness, impeached by a showing of a prior inconsistent statement, to explain the reasons for the inconsistency.

STATEMENT

After a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted of having conspired to violate 18 U.S.C. 1952 and of a substantive violation of that provision by travelling from Chicago, Illinois, to New Orleans, Louisiana, with one William Wangard, an unindicted co-conspirator, for the purpose of carrying on a business enterprise involving gambling. He was sentenced to three years' imprisonment and fined $5000. The court of appeals affirmed.

The pertinent evidence is set forth in the opinion of the court of appeals (Pet. App. 4a-5a). Briefly, it showed that in the summer of 1963 petitioner asked Wangard, an electronics engineer, to modify a tape recorder for use in recording telephone conversations and thereafter asked him to build a portable transmitter-receiver pair with a range of one to ten miles (Tr. 54-56). Wangard believed that petitioner intended to use the equipment in connection with his work as a private investigator. However, in Janu-

ary 1964 petitioner told Wangard that he planned to use the receiver-transmitter units in a past-post betting scheme involving three people. "One would be inside the track with a transmitter, the second person would be outside the track in a car with a receiver awaiting the race result from the inside man, and upon its receipt would then telephone [petitioner's] apartment in Chicago to relay the name of the winning horse to a third person who was to place the bet" (Pet. App. 4a; Tr. 62).

On January 7, 1964, petitioner and Wangard, who accepted petitioner's invitation to join the scheme, drove from Chicago to New Orleans, where Wangard acted as the inside man, transmitting the name of the winning horse according to a pre-determined code, and on several other occasions acted as outside man (Tr. 63-67). After eight days in New Orleans petitioner and Wangard left for Miami, where the past-post betting scheme was again carried out for three days, with Wangard acting as the inside man (Tr. 69-71).

Subsequent to Wangard's return to Chicago on January 21, 1964, he was contacted by the F.B.I. (Tr. 89-93). In a conversation with petitioner in May 1964, Wangard told him that "he had told the FBI that he did not transmit or receive any race results; that he thought the defendant was in New Orleans and Miami on some sort of industrial espionage work; that the witness' work there was strictly technical as far as the electronic equipment was concerned; and that he had been left alone a lot

of the time, and had gone to the race track because he had nothing better to do" (Pet. App. 4a-5a).

Other government witnesses (Fullmer and Payne) corroborated Wangard's testimony concerning the presence of Wangard and petitioner in New Orleans and Miami on the dates in question (Tr. 136-140, 142-144). William Eiland, an electronics technician, testified that in October 1963 he had mentioned that there was a time lag between the time a race is run in one place and the receipt of the information in Chicago. Several days later, petitioner asked Eiland about the possibility of using a citizen's band radio for transmitting information from the race track. Eiland said that, although such a radio could be used, it was dangerous because of the likelihood of monitoring, and that other, safer equipment existed (Tr. 16-20).

The main witness for petitioner was Joseph McClellan, who operated a tavern in Chicago. McClellan testified that in January 1964 Wangard telephoned him from Florida and requested that McClellan wire $40, which Wangard needed to return to Chicago. Wangard said that he and petitioner were working on an industrial espionage case in Florida (Tr. 164-166). McClellan further testified that Wangard's reputation for truth and honesty was bad (Tr. 170).

ARGUMENT

1. Petitioner argues (Pet. 6-10) that, since the testimony of Wangard was necessary to establish

the fact that a crime had been committed, it was error for the trial judge to charge as follows (Tr. 282):

> An accomplice is one who voluntarily participates in the commission or the planning of a crime. The witness William Wangard is an accomplice of the accused in this case. As an accomplice his testimony must be closely examined and weighed with great care.

These instructions were part of a full charge on the general question of credibility, making clear that it was for the jury to determine the credibility of the witness (Tr. 281-283). The accomplice instruction, within the framework of these general credibility instructions, was merely cautionary, designed to benefit petitioner by calling to the jury's attention that an accomplice's testimony "must be closely examined and weighed with great care" (Tr. 282). Since Wangard's testimony, if credited at all, clearly showed him to be involved in a crime, the instruction had no potentiality for prejudice.[1] The court below properly found that, even if the instruction were erroneously worded, the error was harmless.

2. In his closing argument, the prosecutor made several references, without objection by the petitioner, to the submission that Wangard's testimony was

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[1] In *United States* v. *Balodimas*, 177 F. 2d 485 (C.A. 7), relied on by petitioner, the court of appeals reversed the conviction for the specific reason, inapplicable here, that the "accomplices," who had no knowledge regarding the falsity of the tax returns filed by the defendant, were not actually accomplices.

true and correct and to the fact that it was uncontradicted (Pet. 11). The court of appeals rejected petitioner's contentions, reiterated here (Pet. 11-14), that these remarks amounted to improper comment on petitioner's failure to testify in his own behalf. Such impropriety would exist only where "no one other than the defendant could have contradicted Wangard's testimony" (Pet. App. 7a-8a). The court of appeals found that the record did not show this to be the case here. McClellan's testimony regarding his conversations with Wangard, in which Wangard stated that he and the petitioner were in Florida working on an industrial espionage case, did tend to contradict Wangard's testimony. Evidence that petitioner had in fact been so engaged could have been offered, if it existed, to further contradict Wangard's testimony.

The court of appeals also concluded that, viewed in context, the prosecutor's statement about the truth of Wangard's testimony did not constitute an improper vouching for the witness' testimony (Pet. App. 8a). The prosecutor's comment in no way suggested that it was based on personal knowledge or on any matter not in the record. The jury was properly instructed that arguments of counsel were not evidence and that the jury was to determine each witness' credibility (Tr. 266). In these circumstances, any possible error in the prosecutor's remarks did not affect petitioner's substantial rights or constitute plain error. See *Lawn* v. *United States*, 355 U.S. 339, 359-360, n. 15; *United States* v. *D'An-*

tonio, 363 F. 2d 151, 155 (C.A. 7), certiorari denied, 385 U.S. 900.

In commenting in his closing argument upon McClellan's testimony concerning Wangard's reputation, the prosecutor stated: "I don't believe Mr. McClellan liked Mr. Wangard, and I think any defense attorney can go and find someone who doesn't like you or me." Upon counsel's objection, the trial judge cautioned the prosecutor to "keep your conjectures within the realm of possibility" (Tr. 256-257). The court of appeals correctly concluded that the prosecutor's comment, although improper, did not warrant reversal of petitioner's conviction (Pet. App. 8a). The comment was isolated and not repeated. The trial judge specifically instructed the jury that "statements and arguments of counsel are not evidence" (Tr. 266).

3. On cross-examination Wangard admitted that his statements to petitioner regarding his conversation with the F.B.I. were false. On redirect he testified that the reason for making such false statements was his fear of what the petitioner might do if he knew what had actually been said (Tr. 128-130). While recognizing that normally a witness, impeached by a showing of inconsistency, may explain the reasons for the inconsistency, petitioner argues (Pet. 21-23) that here the evidence should not have been admitted because there was no explanation of the basis for Wangard's fear. The absence of a more detailed account of the reasons for Wangard's fear does not detract from the accepted

principle allowing an impeached witness to explain the inconsistency in his testimony. Petitioner's counsel had the opportunity on re-cross examination to explore the basis for Wangard's fear but chose, for reasons not reflected in the record, not to seek a more detailed explanation.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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